United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

JANUARY TERM, 1903.

No. 1277 **203**

JULIUS I. ATCHISON, APPELLANT,

vs.

BARBARA WILLS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 28, 1903.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 12, 1903.

In the Court of Appeals of the District of Columbia.

JULIUS I. ATCHISON, Appellant,
vs.
BARBARA WILLS. } No. 1277.

a Supreme Court of the District of Columbia.

BARBARA WILLS
vs.
JULIUS I. ATCHISON. } No. 44535. At Law.

UNITED STATES OF AMERICA,
District of Columbia, } *ss*:

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Declaration.*

Filed February 26, 1901.

In the Supreme Court of the District of Columbia.

BARBARA WILLS
vs.
JULIUS I. ATCHISON. } At Law. No. 44535.

The plaintiff, Barbara Wills, sues the defendant, Julius I. Atchison, for that heretofore, to wit, on the 7th day of December, A. D. 1900, a servant and employee of said defendant, by authority of and at the direction of said defendant, and in the prosecution of his the said defendant's business without the knowledge or consent of said plaintiff or of any of the occupants of the house in which she, the said plaintiff, then resided, entered in and upon the house and premises known as No. 126 G street, northwest, Washington, D. C., where this plaintiff then resided and still resides, for the ostensible purpose of making certain repairs, to wit, to repair the plumbing and sewerage of said premises or of the adjoining property; that at the time aforesaid no defect within the knowledge of this plaintiff existed in regard to the sewerage or plumbing of said premises No. 126 G street, northwest, Washington, D. C., and this plaintiff had no knowledge or expectation that any such repairs were needed or con-

templated in or about or adjoining said premises; that a rear door to one of the bed-rooms on the ground floor of said premises opens upon a porch, directly in front of which door in the floor of
2 said porch is a trap-door and stairway leading to an excavation under said premises; that said excavation has no walls or paving, and at the time aforesaid was not used, and prior thereto had never been used by this plaintiff or by any of the occupants of said house and premises for storage or for any other purpose, and prior to the happening of the injuries herein complained of the said trap-door remained continually closed; that it was the duty of said defendant, his servants and employees, while in and upon said premises, to carefully conduct themselves and do no act which would endanger the life or limb of this plaintiff and other occupants of said house and premises, but that said defendant, unmindful of his duty in this regard, did at the time aforesaid and in the manner aforesaid, by his said servant and employee, enter in and upon said house and premises and entered said excavation thereunder by means of and through said trap-door, and carelessly and negligently left said trap-door open; that at the time aforesaid this plaintiff, who was engaged in household duties in said rear room, and who had no notice whatever of the presence on said premises of said defendant by his said servant and employee, or of the opening of said trap-door aforesaid, found it necessary to leave said room through the rear door thereof which opened upon the aforesaid porch, in the floor of which and directly in front of said rear room door and within about two feet of same said trap-door was located, and while so entering upon said porch, and without any carelessness or negligence on her part, fell through the open space which said defendant by his said servant and employee had carelessly and negligently left exposed, by reason of the opening of said trap-door; that by reason of said fall this plaintiff sustained painful,
3 serious and permanent injuries, to wit, a fracture of her right arm near the shoulder, and severe and painful bruises about her left knee, right eye and head; that in consequence of said injuries she, the said plaintiff, has suffered and still suffers great pain of body and mind, and has been seriously and permanently injured in her bodily health and strength, and has sustained a severe nervous shock and has been put to great expense in procuring medicines and medical and surgical attention, and has been prevented from attending to her lawful affairs and business, and has lost great profits which she otherwise could and would have made, and the plaintiff avers that the injuries sustained by her were caused by the gross and wanton negligence of said defendant's servant and employee in failing to give any warning or notice of the fact that he had entered said premises and opened said trap-door and left the same open; and in carelessly allowing said trap-door to remain open; wherefore the plaintiff brings suit and claims the sum of five thousand dollars ($5,000.00). besides costs.

P. R. HILLIARD,
R. A. HEISKELL,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof, otherwise judgment.

P. R. HILLIARD,
R. A. HEISKELL,
Attorneys for Plaintiff.

4 *Plea.*

Filed March 22, 1901.

In the Supreme Court of the District of Columbia.

BARBARA WILLS
vs.
JULIUS I. ATCHISON. } At Law. No. 44535.

Now comes the defendant, by his attorneys, and for plea to the plaintiff's declaration filed herein, says that he is not guilty as alleged.

BATES WARREN,
JNO. RIDOUT,
Attorneys for Defendant.

Joinder of Issue.

Filed March 26, 1901.

In the Supreme Court of the District of Columbia.

BARBARA WILLS
vs.
JULIUS I. ATCHISON. } At Law. No. 44535.

The plaintiff joins issue on the plea of the defendant filed in the above-entitled cause.

P. R. HILLIARD,
R. A. HEISKELL,
Attorneys for Plaintiff.

5 *Memorandum.*

October 30, 1902.—Verdict for plaintiff for $1600.00.

Supreme Court of the District of Columbia.

FRIDAY, *November* 7, 1902.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

BARBARA WILLS, Plaintiff,
vs.
JULIUS I. ATCHISON, Defendant. } At Law. No. 44535.

This cause coming on to be heard upon the defendants' motion for a new trial, and the same having been heard, it is considered that the same be, and hereby is, overruled, and judgment on verdict ordered: Therefore, it is considered that the plaintiff recover against the defendant, one thousand six hundred dollars ($1600) with interest thereon from the 7th day of November, 1902, being the money payable by said defendant to the plaintiff by reason of the premises, together with her costs of suit to be taxed by the clerk, and have execution thereof.

The defendant notes an appeal to the Court of Appeals; and the penalty of the bond on said appeal, to operate as a supersedeas, is fixed in the sum of twenty-four hundred dollars ($2400).

November 25, 1902.—Appeal bond filed.

Memorandum.

December 19, 1902.—Time for presentation of bill of exceptions extended until Dec. 30, 1902.

Supreme Court of the District of Columbia.

TUESDAY, *December* 23, 1902.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

BARBARA WILLS, Plaintiff,
vs.
JULIUS I. ATCHISON, Defendant. } At Law. No. 44535.

Now again comes here the defendant, by his attorneys, and tenders to the court his bill of exceptions taken during the trial of this case, and prays that the same may be duly signed, sealed and made part of the record, now for then, which is accordingly done.

7 *Bill of Exceptions.*

Filed Dec. 23, 1902.

In the Supreme Court of the District of Columbia.

BARBARA WILLS
vs.
JULIUS I. ATCHISON. } At Law. No. 44535.

Be it remembered that at the trial of the above-entitled action before Mr. Chief Justice Bingham and a jury, which began Oct. 28th, 1902, and was concluded on the 30th, day of October, 1902.

Mr. Heiskell of counsel for the plaintiff, made an opening statement, the concluding portion of which was as follows,—

"And the plaintiff avers that the injuries sustained by her were caused by the gross and wanton negligence of said defendant's servants and employee in failing to give any warning or notice of the fact that he had entered said premises and opened said trap-door and left the same open, and in carelessly allowing said trap-door to remain open."

Thereupon BARBARA WILLS, the plaintiff, testified on her own behalf and on direct examination and gave evidence tending to prove,

That she lived with her son at premises 126 G St., N. W., Washington, D. C., and had been living there for about ten years. That in the month of December 1900, she sustained an injury, that she fell into the cellar at that time, that the accident happened on the 7th of Dec., 1900, about 9 o'clock in the morning, that she went into her room, in which there are two doors in
8 the same doorway opening on the back porch, that she wished to go out on the back porch, that both doors were shut, the door on the inside is a glass door, and the outside is a slat door. They shut pretty much together, the slat door opens to the right and the glass door to the left. That in going out on the back porch she had to go over the trap-door which is right at her door, that she opened the door and did not look did not see it quick enough and plumped right down into the cellar. When she opened the slat door, her foot was ready to make the step that she made it and stepped down and fell in the cellar on her right side. That when she looked through the glass door, she could not see the opening into the cellar, if the slat door was closed, that it was closed and she could not see through it. That she wanted to go out, did not know that anything was open and wouldn't have looked, hardly. That she had made no complaint of the condition of the plumbing and did not know that there was any plumber on the premises. That she neither heard nor saw him and had no knowledge of his presence, that she fell on her right side and for five weeks couldn't use her right arm. It was all bruised and solid and she had to use her left hand, that her knee was injured and that her arm

was broken near the shoulder. That in March after the accident, she wanted to get up on her feet and her left knee was strained and she could not stand on it until late in April, that the injuries caused weakness and sickness, that she had three spots on top of her head where the skin was cut, that both of her eyes were black, that when she fell down in the cellar she thought there was nobody about, when she came to and could see, she saw a colored man standing in the cellar with a rag in his hand and a piece of gas pipe in the other hand looking at her and he picked her up and carried her upstairs on the
9 porch and set her in an armchair there, that she was unable to move without help, that she knew that her son was in the yard, that she called him and he took her in the house and put her in bed, and then went for Dr. Ball, that the doctor came and placed bandages and plaster cast on the arm that the plaster cast was on her arm until the last of March, two months or more. The man in the cellar was a colored man who worked for Atchison, that before the accident, she hardly ever had a sick day and did all her housework without help, that she is now going on eighty-five years, that since the accident, her health is nothing and she is always weak, that she is unable to raise her arm to the top of her head, that she cannot reach at the table, is obliged to use the left hand. That she cannot reach her hair with her right hand, that she used to suffer a great deal of pain in that arm and does yet sometimes. Prior to this accident, had not been uptown for three or four years, was able to go out prior to the accident.

Thereupon, on cross-examination, the witness gave evidence tending to prove, that on the morning in question, she had been in her room not more than half an hour before she went out on the porch, that she went out from the other room and went into her room. The room had a door into the hall, that about a half an hour before the accident she came out of the kitchen into her room, that she had prepared breakfast that morning and had been in the kitchen shortly before the accident. That she knew about the trap-door, but did not know it was open. That she did not look when she went out, that the trap-door was not open three times in a year because
10 the cellar was not used. That it was not used to ventilate the cellar as there was another place at the end of the porch. That what she calls the cellar is not a regular cellar because there are no walls in it and only a mud floor, that she did not fall on the man's back, he was standing away off looking at her when she opened her eyes, that he was as far away as the desk in the court-room, (indicating a desk about ten feet distant), he was in the cellar when she first saw him and she was lying at the step, the steps go straight down, that she did not hit any steps but fell clear. That she was in her room for five months and did not leave her bed for three months, that when she went from the kitchen to her room, she went directly from one room into the other and did not go on the porch. That there are three ways of leaving her room, one in the hall, one on the porch and one in the kitchen.

Thereupon the plaintiff called as a witness, BENJAMIN FRANKLIN WILLS, who gave evidence on his direct examination tending to prove that the plaintiff Barbara Wills is his mother, that he and she have lived at premises 126 G St. N. W., since about the fall of 1891, and they lived there December 7th, 1900. That his mother was injured on that day, that his first knowledge of her injury was when she called to him from the chair on which she was sitting. That on the morning of that day, he was on the front porch of his house when Mr. Atchinson's wagon was driven in front of the next door, there were two colored men in the wagon, one of them carried some tools to the parking in front of witness' house and was turning to go to the wagon, when witness asked him whether he was going to dig in front of the house, that he replied, no, back of the house, kept on going to the wagon and the two men drove off northeast. The other man
11 staid at the wagon about thirty-five or forty feet away from witness and about twenty-three feet away from the other colored man. That the colored man's reply was made in an ordinary tone of voice. That witness remained on the porch about fifteen minutes, then went into the house, went through the hallway leaving the front door shut but not locked nor bolted; that he went into the back yard to get some wood, had been there twelve or fifteen minutes when he heard his mother call, could not see her nor the trap-door from where he was in the back yard. When witness reached her she said she was killed and pointed out where she had fallen, witness had no idea what had happened until he saw the open trap-door, and then he saw the back of the colored man down there, that he took his mother in, put her on the lounge and went for Dr. Ball who came promptly, before going for the Doctor, witness notified his daughter and son-in-law and told them to stay with his mother. Before the accident his mother's health was very good, had done all the housework and was very active for her age, since the accident her health has been very poor, she is always in feeble health. The Doctor put a cast on her shoulder and bound her arm up tight. The case remained two months at least. His mother was confined to her bed in the neighborhood of two months and had no use of her limbs. That she was strained very badly in one of her legs and hips, thinks it was her left leg, she was very much bruised up, she complains a great deal now of her arm, she does not seem to be able to use the elbow-joint of her arm, is unable to do the housework now. Witness had no notice of the presence of Atchison's man on the premises that morning the plumber
12 did not say he was going in the cellar, had made no complaint concerning the plumbing. There was nothing wrong with the sewerage on our side. The trap-door is about the centre of the house on the porchway. That both plumbing services for witness' premises and next door discharged through the common pipe which runs under witness' cellar and discharges in the parking. The cellar to which he refers is that into which his mother fell, did not hear the man at work in the cellar had no idea he was there, nor how he got in, knows the colored man, he has been there

a number of times before, principally on the other side, outside of the house next door, understands he was at work next door on the day before the accident. That no use was made of the cellar and none had been made for some time not for eight or nine years prior to the accident. The steps are ordinary steps, they begin on the opposite side of the trap-door from the door to his mother's room as you descend the steps, you face his mother's room. The steps are in very poor condition. The depth of the cellar right at the steps is about five feet and a half. When the trap-door is open there is a space of twenty or twenty-one inches from the flare of the door jamb of his mother's room to the trap-door opening, witness has measured it, the trap-door is two feet, three and a half inches by two feet, two and a half inches. When the outside door of his mother's room is open, it overreaches the trap by about three inches. His mother's door is about two feet wide, it opens right out over the trap-hole. The trap-door was open very seldom, about twice a year to give a little air.

Thereupon the witness was asked the following questions:

Q. What, if any notice, was accustomed to be given to the
13 members of the household of the trap-door being open on the occasions when it was open?

To which question the counsel for the defendant objected on the ground that the evidence songht to be elicited was irrelevant, but the court overruled the objection, to which ruling, counsel for the defendant then and there excepted. Thereupon the witness answered the question as follows:

A. I never opened the trap unless I noticed the household that it was open in case of their going out unawares and falling in it.

The witness further gave evidence tending to prove that he knew the colored man to be the servant of Mr. Atchison, the defendant.

Thereupon the witness on cross-examination gave evidence tending to prove that he knew that the colored man had frequently done plumbing work on the premises, that when the men drove off in the wagon, they left tools on the parking in front of witness' house, he is positively sure that both of the men entered the wagon and drove away, that no plumbing work had been done on witness' premises for some time but frequently in the adjoining house. When witness went for the doctor, the tools were not on the parking. When he went to his mother, only saw one colored man, could see his back, he was down the cellar and the cellar where he was standing or stooping was about seven feet deep and he was about ten feet from witness. The colored man appeared to be in a stooping position.

Thereupon on redirect examination, the witness gave evi-
14 dence tending to prove that he and his mother constituted his family, his daughter and her husband lived in the front part of the house. The daughter's name is Salome Ricketts, her husband George Ricketts is now deceased. At the time of the accident, Mrs. Ricketts was in the front room doing some housework,

there were two separate families living in the house, one family living upstairs, witness rented the lower part in which his mother, himself, his daughter, her husband and child lived. His daughter and her husband at the time of the accident, kept house separately from witness. The people upstairs rented from Mr. Friebus. About six weeks before the accident, the party upstairs notified Mr. Friebus that there was trouble with the plumbing.

Thereupon the plaintiff called as a witness Dr. CHARLES A. BALL, who on direct examination gave evidence tending to prove that he was a physician of twenty-five years' experience, that on the 7th of Dec. 1900, he was called to attend Mrs. Barbara Wills, the plaintiff, he found that her right arm near the shoulder was fractured, the face and head were bruised badly and the left knee injured but not fractured. That he put the arm in splints, for the bruises he prescribed nothing more than hot water, thinks the arm was in splints about two months. His last visit was paid April 4th, 1901. Between the date of the accident and April 4th, 1901, she was in bed most of the time. Witness examined the plaintiff's arm last Friday, found the arm in good condition. It is a little restricted at the shoulder-joint, otherwise the fracture is good, and does not think she could get that arm above her head. When the plaster cast was taken off, the knee was all right. There was no permanent injury to the knee. The fracture of the arm is united all right. In the injury the shoulder-joint was more or less contused and there is some restriction, some adhesion.

* * * * * * *

Thereupon the following occurred, this verbatim statement being inserted at the request of counsel for plaintiff.

By Mr. HILLIARD:

"Q. Is or is not the injury to the arm permanent?
A. Is it not what?
Q. Is it permanent or is it not?
A. Well, I don't suppose, at her age, she could get any more motion. The fracture is united all right. In the injury the shoulder-joint was more or less contused, and there is some restriction, some adhesion.
Q. Is that injury to the shoulder permanent, Doctor?

Mr. RIDOUT: I object to that question. The injury alleged is to the arm.
Mr. HILLIARD: I am speaking about the arm.
Mr. RIDOUT: You said the shoulder.
Mr. HILLIARD: By these adhesions.
Mr. RIDOUT: The only claim here is injury by fracture of the right arm.
The COURT: I understand the physician to say that the shoulder-joint is somewhat restricted.
Mr. RIDOUT: There is no claim for it.

The COURT: But the fracture, he said, was of the bone, near the shoulder.

Mr. RIDOUT: He says near the shoulder, yes.

The WITNESS: Up there in the arm.

Mr. RIDOUT: What he has stated is that the fracture was
16 near the shoulder, and that it is completely healed. And then he was proceeding to give some testimony about the damage to the shoulder. There is no claim for injury to the shoulder, and the fracture is entirely predicated as to the arm.

The COURT: He has said that it is somewhat restricted as to motion.

Mr. RIDOUT: That is not competent under this declaration.

The COURT: That depends upon whether the injury is to the arm, where the fracture was, or whether there is some separate injury. If it comes from the fact of the injury to the arm——

The WITNESS: It is from the inflammation that caused these adhesions.

The COURT: What is that?

The WITNESS: The adhesion is the result of the inflammation.

The COURT: From what?

The WITNESS: From this fracture of the arm.

The COURT: Of the arm?

The WITNESS: Yes sir. The fracture was about an inch below the joint.

The COURT: The injury you speak of is the result of that?

The WITNESS: Yes sir, I do not see how it could be separated.

The COURT: That is competent.

Mr. RIDOUT: We reserve an exception.

By Mr. HILLIARD:

Q. When you speak of restriction, do you mean of the shoulder or arm?

A. It is a restriction of the movement of the shoulder-joint.
17 There is no restriction in the elbow.

Mr. RIDOUT: We reserve an exception to that question and answer.

The COURT: The objection is overruled.

Mr. RIDOUT: We reserve an exception to the ruling of the court.

By Mr. HILLIARD:

Q. I want to make it clear. Is there restriction in the use of the right arm; in other words, can she raise her arm up like that (indicating)?

Mr. RIDOUT: He has answered that question.

Mr. HILLIARD: No sir, he has not.

A. There is a restriction. As I said, there is a restriction at the shoulder-joint.

Mr. RIDOUT: We object to any testimony about the shoulder-

joint, and the court overrules the objection, and we except, as I understand ?

The COURT: Yes.

Witness further gave evidence tending to prove that when he first saw the plaintiff she appeared to be suffering greatly, and to be very much prostrated, that the prostration is the result of the shock and that part is temporary. That when witness last saw the plaintiff, she complained of tenderness on pressure over the points that were injured. In his opinion when the arm is still and not in use there is no pain whatever, should judge that there is some pain when she moves it and gets it up beyond a certain point, her condition in April 1901, is about the same as it is now. The pain and suffering which the plaintiff endured resulted from the in-
18 juries which she had received, the injuries he has spoken of.

Thereupon it was admitted by counsel on both sides that the colored man spoken of in the testimony was the defendant's servant, that he was on the premises where the accident happened in the discharge of his duty, and that if there was any trouble with the plumbing at 124 G St. it might be necessary to go on the premises 126 G St., in order to find out what that trouble was.

Thereupon the plaintiff called as a witness SALOME A. RICKETTS, who gave evidence on direct examination tending to prove that she was the grand-daughter of the plaintiff, that on the morning of Dec. 7th, 1900, an accident happened to her grandmother on premises 126 G St. N. W., where witness then resided. Witness first learned of it, when her father called her to go to her grandmother. Witness was in the front room with her husband and little child, she found her grandmother lying on the bed apparently without any use of herself, she could not raise her arm at all. Prior to the accident witness had no knowledge that anybody other than the family was on the premises, did not see the plumber until after her grandmother was hurt, then went out on the back porch, the trap-door was open and saw him down in the cellar. Witness neither saw nor heard the colored man when he entered the premises. Knew of the existence of the trap-door, which was never used to her knowledge. That her grandmother's arm was fractured at the shoulder and her knee was sore and her eyes kind of blacked and the back of her head was injured. That a plaster cast was put on the arm ; it remained on about two months, her grandmother remained in bed about four months, witness had lived on the premises since May 1900. Before the accident her grandmother did her own
19 work and had nobody to help her. Since the accident she has not been able to do anything. Witness had never made any complaint about the condition of the plumbing.

Thereupon WILLIAM KOCH, a witness called by the plaintiff testified on direct examination and gave evidence tending to prove that he had examined premises 126 G St. N. W., that at the end of the

hallway, there is a door which opens on a porch, and that there is a double door opening into a bed-room, that in front of the latter door is a trap-door opening into the cellar, that witness is acquainted with the defendant, that in May or June 1902, the defendant stated to witness that his men had gone to the premises to make repairs, had gone into the cellar had been in the habit of going into this place, knew just how the pipes were situated, had gone into the cellar to make the necessary excavation to the sewer, that while working down there Mrs. Wills had fallen on his colored man's shoulders, and the man had lifted her up on the porch.

Thereupon, BENJAMIN FRANKLIN WILLS, without taking the stand having been heretofore duly sworn, was examined as follows: (This verbatim statement being inserted at request of counsel for plaintiff.)

By Mr. HEISKELL:

Q. I want to ask if there was any barricade or anything to protect one from stepping into this door, which had been placed there?

Mr. RIDOUT: That is all a part of his case-in-chief. I submit that this gentleman was thoroughly examined.

Mr. HEISKELL: I have a right to recall him. I have not closed my case. I simply want to ask him that one question without putting him back on the witness stand.

The COURT: Very well then you may ask him.

By Mr. HEISKELL:

Q. Was there anything any barricade or anything placed there to protect the door?

A. No sir, there was not.

Thereupon HUGH A. CAMPBELL, a witness on behalf of the plaintiff, gave evidence tending to prove that he was an architect and had drawn a plan of the rear portion of premises 126 G St. N. W. on the first floor on a scale of a quarter of an inch to the foot, the plat was made March 20, 1901. The witness thereupon identified a plat and pointed out thereon the front door, the main hall, the rear entrance from the main entrance out to the back porch, the partition between the room of Mrs. Wills and the hall, the dining-room and sitting-room, the door leading to the porch from Mrs. Wills' room, that the last-mentioned door consists of an inside door with glass panels and on the outside a green slat door. That the doors are two feet wide, that on the porch outside the last-mentioned door is a trap-door which is two feet two and a half inches wide, and two feet, six and a half inches long, the distance from the outer door to the edge of the trap-door is one foot, eight and one-half inches. That on the porch was an ice-box the distance between which and the trap-door was one foot. Witness pointed out on the plan a fence, the distance from which to the wall of the house was five feet seven inches. That the distance from Mrs. Wills' room door to the

rear wall of the house, was twenty-six feet five inches. Witness
then pointed out on the plat a door from the kitchen
21 to the porch, that the excavation covered by the trap-door is
cut away at the back. As you come out of the door going toward the hatchway, you face the steps, the steps are leaning toward you and follow down the inclining bank. Back of it is pretty nearly up to the top of the porch, but the back is, he thinks, seven feet one inch deep. He measured it, does not remember exactly, but it is nearly seven feet at the bottom of the steps, starting with the porch and going down. The steps are steep, they are almost like a ladder. Witness then illustrated by drawing a plan with chalk on the floor in front of the jury and explained to them the relative locations of the trap-door, the doors opening from Mrs. Wills' room, the partition wall and the other doors. He then gave further evidence tending to prove that the solid door which has glass panels opens with the hinges on the left-hand side swinging back against the wall, then there is a ten-inch partition and the slat or screen door swinging with the hinges on the right-hand side against the wall, that the trap is two feet six and a half inches long by two feet, two and a half inches wide, that the trap opens against the wall and that the slat door swings two inches across the corner of the trap. Witness also indicated on the plans the kitchen door. That in addition to the street entrance to the premises there is an alleyway in the rear. That all the measurements on the plan are accurate.

On cross-examination the witness gave evidence tending to prove that he made his measurements March 20, 1901, and again a
few days before the trial, that at the time of his measure-
22 ments in March, he measured the depth of the cellar, that
the depth was entered on his notes, but is not marked upon the map, that he took the depth of the cellar from the corner of the trap-door over by the kitchen wall, that he measured as nearly as he could from the top down to the bottom of the steps, that no one suggested to him at what point he should take the measurements, that the porch is five feet, seven inches wide, that it is about three feet one inch from the edge of the trap to the fence.

Thereupon on redirect examination the witness gave evidence tending to prove that the plan referred to was an outline of the doors and porch, simply the line of the porch and the openings leading out to it, the hallway and the trap-door.

Thereupon the plaintiff rested.

Whereupon the defendant to maintain the issues on his part joined, called as a witness THEODORE FRIEBUS, who on direct examination gave evidence tending to prove.

That as a real-estate agent, he had charge of renting premises 126 G St. N. W., and still has such charge. About the date last mentioned, there was reported from that house or the adjoining one, that there was something wrong with the plumbing, that these two houses use one main pipe, that he instructed Mr. Atchison, the defendant to attend to the matter.

Thereupon on cross-examination, the witness gave evidence tending to prove that he did not recollect from which house the notice came, but as a result he notified the defendant to have the work done for one or the other of the premises.

Thereupon the defendant testified in his own behalf and
23 on direct examination gave evidence tending to prove that he had been engaged in the plumbing business about 40 years, that on or about the 7th of December, 1900, Mr. Friebus left an order with him to repair the plumbing at 126 G St. N. W., the pipe being stopped up, that witness sent a plumber to the premises who returned and reported that it would be necessary to dig up the pipe, that witness saw Mr. Friebus, who directed him to proceed, and thereupon witness sent a man to unstop the sewer. Afterwards on the same day, about 9 o'clock in the morning witness received a telephone message calling him to the premises, that in company with Mr. Friebus, they went to the front of the premises; when they went in everything was quiet; waited fifteen or twenty minutes and seeing *one* one, went away, that before the occasion for this work witness had had other occasions to unstop the sewer, on one occasion working five days. At this time the men were in the cellar and the trap-door was open all day until the men quit work in the afternoon. There was no other way of reaching the sewer, the trap has to be left open because the cellar is four feet or four feet six inches, deep, and a man when he is there digging is right up in the trap-door. A man has to throw the handle off his pick and when making the excavation a man necessarily has his back up in the trap-door. He could not work any other way. Had measured and from the trap-door to the floor of the cellar, was four feet or four and a half feet. The man who was working there on this occasion is a pretty big man and ought to fill the door up pretty well.

There are three steps in the cellar.

24 Thereupon on cross-examination the witness gave evidence tending to prove that the plumber first sent to the premises to unstop the sewer did not succeed, he reported that it would have to be dug up. The order was left by the agent for No. 126. The agent gave directions to dig up the sewer, and witness thereupon sent a man to do the work. The man had been working for witness for several years, he is the man who was on the premises on the day the accident occurred. Witness has been down through that opening, there are pipes or sewer connections immediately under the trap-door. Witness was down in the opening about two months after the accident happened. That the sewer pipe comes from the cellar and one pipe supplies the two houses. The sewer pipe comes along right where the trap-door is, just to the left. The sewer runs north and south.

The witness further testified on cross-examination that his first notice concerning the work to be done at 126 G St., northwest, was received December 7th, which was not the day of the accident. The accident was on the 9th, is quite positive of that. On the 7th, the

plumber went to unstop the sewer, but did not succeed. On the 8th, witness saw Friebus and was directed to dig up the sewer. On the 9th, the laborer employed by witness went to the premises to unstop the sewer and that laborer is the man who was there on the day of the accident. It was on the 9th, of Dec. 1900, that witness called at the Wills house with Mr. Friebus after it had been reported to him that Mrs. Wills was hurt. Witness does not know that the 9th of Dec. 1900 was Sunday.

Counsel for defendant afterwards admitted that the accident occurred on December 7, 1900.

25 Thereupon WINFIELD S. COLBURN, a witness called by the defendant gave evidence tending to prove that he was a plumber, formerly in the employ of the defendant. That on the 7th of December, 1900, as he thinks and about two days prior to the day the man went there and dug it up, witness was sent to see whether he could clear the sewer by the use of a plunger but after trying, he decided that the only way was to dig it up. When witness went to the door, a middle-aged lady opened it and he told her we would have to dig it up and she remarked there was always some digging doing around there.

Thereupon on cross-examination, the witness gave evidence tending to prove that he was not on the premises on the day of the accident, but was about two days before. That was the only trip witness made there. That when witness went to the premises, he went there to plunge out a sewer, for No. 126, the west house, does not know from whom the complaint came. Was unable to plunge it out and they had to dig it out. Did not go into the cellar.

Thereupon FREDERICK BURNET, a witness called by the defendant, gave evidence on direct examination tending to prove that for the last sixteen years he has been working with plumbers, is employed by the defendant and was so employed in December 1900. Was instructed by Mr. Atchison to go to premises 126 G St. Was accompanied by a boy named Robert Clark went down in the wagon, reached the premises about eight o'clock, saw a gentleman sitting on the porch, indicates Mr. Benjamin Franklin Wills, told him that I was going to unstop the sewer. He said, Where are you going to dig? Told him in the back, and after getting the wire, rods and tools out of the wagon, threw them in front of the yard, took up a pick and shovel and a bag with tools
26 in it, Mr. Wills opened the door and witness followed him right in, Mr. Wills went on down the yard and witness went on to work. Did not see Clark after witness took the tools out of the wagon. Clark went away with the horse and wagon. Witness did not go back in the wagon. After going in, witness opened the door and went to digging. Mr. Wills said he was glad that witness was going to open the sewer. Witness had dug there before, had put the sewer in after digging it up. The trap-door was opened by the witness. There is a little platform in front of the kitchen door

and then you go back through the hole and the top leans up against the side of the house, pulled the top up and went down, which is the only way to get in that cellar, the sewer goes right by the edge of the trap-door, or rather opposite the corner of the trap-door, is a "Y" that goes over in the next yard, was digging in this house where the trap-door is in order to unstop it in the "Y." Witness was standing crossways of the door because the sewer runs so that he had to get that way to dig it, his back was next to the kitchen wall, his back was right across the trap-door, across the opening. There are about three steps. In order to get at the sewer, it is necessary to dig at the trap-door, that the hole is very little over three feet or three feet and a half deep. After witness had been digging fifteen or twenty minutes, felt something down by the side of him and it was a lady and he said "What's going on here?" Nobody said anything, and he shoved the leg up out of the hole and said "What's the matter?" She said, "Call my son." Then she called her son, witness sat her on a chair, the son came and took hold of her left hand, witness took hold of her right hand and they helped her in the door. Then
27 witness went and telephoned to Mr. Atchison. Mrs. Will's leg came down on witness's right side. Lifted her with his right hand. When witness went into the cellar, the kitchen door was standing open. The slat door was not open. Witness could not have gotten out of the opening if that door had been open. The kitchen door was the one witness helped her in. Mrs. Wills did not touch the bottom of the cellar, she could not, there was no way for her to fall through the hole. The room into which Mrs. Wills was helped, was the kitchen. When the trap-door was opened it leaned back against the kitchen wall.

Thereupon upon cross-examination, the witness gave evidence tending to prove that he could not state what the date was. Witness finished his work either the first day he went there or the day after, returned there to work after going to the drug store. Reached the house about eight o'clock in the morning. The wagon stopped in front of the house No. 126. Robert Clark was with him. Clark did not go into the front yard of the Wills house, he put the tools in the yard. When witness got out of the wagon, Mr. Wills was sitting on the porch smoking, the front door was closed, Mr. Wills opened the front door and went in, witness following him. Wills went down to the back of the yard and witness stopped on the porch and went down into the cellar. When witness drove up with Clark in the wagon, he did not go away again until he went to the drug store, went right in with Mr. Wills. Did not see any one else until he felt the weight of Mrs. Wills on him. Did not see her until after he felt her leg beside him. Does not know what room she came from. There is a door which opens over the trap-door like blinds. If the slat door had been open, it
28 would have opened over the edge of the trap-door. The slat door cannot be opened when the trap-door is up because the slat door would strike against the trap-door. Thinks slat door

would strike against trap-door but is not positive, never tried it. That he was standing down in the hole, the opening a little over two feet one way and a little over three feet the other way, it is pretty small, the steps slope towards the door of the room with the slat door. The trap-door opens up against the kitchen. Witness was standing with his back to the kitchen facing out toward the porch stooping over and the door from the room, indicating Mrs. Wills' room, would be on his left side. Mrs. Wills slipped down on witness' right side. When witness helped Mrs. Wills up, she was partly standing on the floor. The witness did not carry her up out of the cellar. The porch floor is in the neighborhood of three feet from the ground. Did not measure it. Does not know what portion of her body struck. After she slid down, witness put his hand under her foot and lifted that up and as he lifted, she got up, and when he came out he put her in the chair. Had not worked on the premises the day before the accident nor in the neighborhood. When he first saw Mr. Wills, he asked what the witness was going to do on his property. Witness said, I am going to unstop the sewer and was going to dig in the back. Did not say he was going down in the cellar, because he had been there three or four times before and always went down to unstop it. On these other
29 occasions had also worked outside in front of the door. The sewer comes right up to the steps and goes underneath the steps in front of the front door and there is no way to unstop the sewer without going underneath there. Had also worked out in the back yard.

Thereupon the defendant called as a witness, ROBERT CLARK, who gave evidence on direct examination tending to prove that he was a laborer and was employed by Mr. Atchison some time in December 1900. Some time in that month, carried Burnett in the wagon with his tools to 126 G St. N. W. When we arrived Burnett took his tools and witness threw some wire over the fence into the yard. There was a white man at the door who asked where he was going to dig. Burnett told him in the back, and they went in and witness went straight back to the shop. Burnet went in the house, does not know where he went in the house, went in the door behind the white man who had spoken to him. Did not see him again until he came back to the shop.

On cross-examination, the witness gave evidence that the house was numbered 126 G St., that it was close to eight o'clock when he arrived there, does not remember what tools he carried, he threw them in the yard and then witness got in the wagon and went back to the shop. Had no conversation with Burnet before leaving, nor with the gentleman in front of the steps, only staid there long enough to get the things out of the wagon and then went right back to the shop. The horse was facing east. There is some little distance from the pavement to the front door of the house. Saw Burnet go in behind the gentleman who was talking to him. Burnet carried

his tools with him. Does not know what Burnet did after he went into the house, nor anything about the accident.

30 Thereupon the defendant rested.

Thereupon BENJAMIN F. WILLS was recalled by plaintiff in rebuttal and gave evidence tending to prove that the driver of the wagon never left his horse at all, he had his back toward the witness all the time, that the other colored man after putting the tools in the parking turned towards the wagon. Witness asked him where he was going to dig and he, while still moving, answered, "Back of the house." He then jumped into the wagon and drove off and witness never saw him again until witness went to help his mother and take her into the house, then the colored man was in the cellar and when witness spoke about the trap being open, he said that it had to be open. Witness had no idea how or when the colored man got on the premises or into the cellar. It is impossible to see the trap-door from the mother's room when the blind door of his mother's room is closed and it was closed at the time of the accident. Condition of porch and trap-door is the same now as it was on the date of the accident and on March 20th, 1901. The accident occurred Dec. 7th, 1900 which was Friday.

The foregoing was all the testimony offered in the cause at the trial.

Thereupon, the plaintiff upon all the evidence in the cause, prayed the court to instruct the jury as follows:

1. The jury are instructed that in determining the preponderance and weight of the evidence, the jury are not necessarily to be governed by the number of witnesses who testified as to any

31 disputed fact, but that it is proper and competent for them to consider the witnesses' source of knowledge and their opportunity for gaining information as to the facts testified to, and also to determine from the general bearing and manner of the witness, and the character of the testimony given, the weight and credibility to be given to the testimony of such witness, to the granting of which prayer, the defendant objected, but the court overruled the objection and granted the said prayer, to which ruling the defendant excepted.

Thereupon the plaintiff upon all the evidence in this cause, prayed the court to further instruct the jury as follows:

2. If the jury believe from a preponderance of all the evidence in the case, that the trap-door in question was opened and left open by the defendant's servant and employee and still remained open at the time of the injury sustained by the plaintiff in this case, and if they further believe from the evidence that plaintiff at the time mentioned, had no knowledge of the fact that said trap-door was open and had received no previous warning and had no reasonable expectation or apprehension that said trap-door was open at the time of the injury and that the plaintiff while in the exercise of reasonable care and diligence, fell through said trap-door opening, and that the defendant's employee was guilty of negligence, which caused the injury to eht plaintiff, then their verdict should be for the plaintiff. To the

granting of which prayer the defendant objected, but the court overruled the objection, and granted the said prayer, to which ruling the defendant excepted.

Thereupon the plaintiff upon all the evidence in the cause,
32 prayed the court to further instruct the jury as follows:

3. If the jury believe from a preponderance of all the evidence that the defendant by his servant and employee entered in and upon the premises occupied by this plaintiff at the time of the injury complained of and without notice or warning of his presence, on said premises and of his intention to enter said excavation and opened the trap-door of said excavation, and entered said excavation carelessly and negligently leaving said trap-door open and that as a result thereof the plaintiff while in the exercise of reasonable care and diligence fell through said opening and was injured, then their verdict should be for the plaintiff.

To the granting of which prayer, the defendant objected but the court overruled the objection and granted the said prayer, to which ruling the defendant excepted.

Thereupon the plaintiff upon all the evidence in the cause, prayed the court to further instruct the jury as follows:

4. The jury are instructed that the burden of proving that plaintiff was guilty of contributory negligence is upon the defendant, and in the absence of proof to the contrary, the law presumes that plaintiff was exercising reasonable and proper care and caution at the time she was injured.

Contributory negligence in order to avail as a defence must be established by a preponderance of the testimony.

But in determining whether the plaintiff was guilty of negligence which contributed directly to her injury, the jury will consider the evidence of the plaintiff as well as the defendant.

33 To the granting of which prayer the defendant objected, but the court overruled the objection and granted the said prayer, to which ruling the defendant excepted.

The court also instructed the jury at the instance of the plaintiff as follows:

5. If the jury find for the plaintiff they are to consider in estimating the damages the injuries to the plaintiff and the damages resulting therefrom to her. They are to take into consideration the sufferings including bodily pain in consequence of such injuries, and also the mental pain and suffering attendant upon and the natural incident of such bodily suffering, the character and extent of her physical disabilities and whether the injury is permanent or otherwise and they should award such damages within the limits of the sum claimed in the declaration as will fairly and reasonably compensate the plaintiff for the personal injuries suffered by her.

To the granting of which prayer, counsel for the defendant objected, but the court overruled the objection, and granted the said prayer, to which ruling the defendant excepted.

Thereupon the defendant, upon all the evidence in the cause, prays the court to instruct the jury as follows:

1. The jury are instructed upon all the evidence in this cause, that the plaintiff is not entitled to recover and that their verdict should be for the defendant, which instructions the court refused to give. To which ruling and refusal of the court, counsel for the defendant excepted.

34 Thereupon upon all the evidence in the cause, the defendant prayed the court to further instruct the jury as follows:—

2. The jury are instructed that under the pleadings in this cause, it is incumbent upon the plaintiff in order to recover, to establish by a fair preponderance of all the evidence, that the defendant was guilty of gross and wanton negligence in performing the work in which he was engaged when the plaintiff was injured if the jury find such injury, and if the jury find that the plaintiff has failed to establish by such preponderance of proof the facts hereinbefore set forth in this instruction, then their verdict should be for the defendant.

But the court refused to give the said instruction, to which ruling and refusal of the court, counsel for the defendant excepted.

Thereupon upon all the evidence in the case, the defendant prayed the court to further instruct the jury as follows:—

3. The jury are instructed that under the pleadings it is incumbent upon the plaintiff to establish by a fair preponderance of the evidence that she exercised due care in approaching the opening in the porch, and if the jury find that the plaintiff has failed to establish this fact by such preponderance of the proof, then their verdict should be for the defendant.

Which instructions the court refused to give, to which ruling and refusal of the court, counsel for the defendant excepted.

35 Thereupon counsel for the defendant upon all the evidence in the cause, prayed the court to further instruct the jury as follows:

4. The jury are instructed that if they find from a preponderance of all the evidence in the cause that the plaintiff failed to exercise reasonable care in approaching the opening in the porch of the premises in which she resided, and that such failure on her part contributed directly to the occurrence of the accident and her injury, then their verdict should be for the defendant.

Which instruction was given by the court.

Thereupon, upon all the evidence in the cause, the defendant prayed the court to further instruct the jury as follows:—

5. The jury are instructed that in this action the burden is upon the plaintiff to establish by a fair preponderance of all the testimony, all the facts which under the instructions of the court, it is necessary for her to establish in order to entitle her to recover, and if the jury shall find that the plaintiff has failed in any material matter to so establish the fact or facts, then their verdict should be for the defendant.

Which instruction was given by the court.

Thereupon the court of his own motion, upon all the evidence in the cause, charged the jury as follows:

GENTLEMEN OF THE JURY: In the case of Barbara Wills against Julius I. Atchison, which has been on trial before you in this court for several days, it is necessary for the court to give you in
36 charge your duties so far as the law is concerned, and in the first place, in order to understand exactly your duty, it is necessary that you should have well in mind what this case is, and it is better presented to you, perhaps, by a careful reading of the material parts of the declaration which has been filed by the plaintiff in this case. It is as follows:

"The plaintiff, Barbara Wills, sues the defendant, Julius I. Atchison, for that heretofore, to wit, on the 7th day of December A. D. 1900, a servant and employee of said defendant by authority of and at the direction of said defendant and in the prosecution of his, the said defendant's business without the knowledge or consent of said plaintiff or of any of the occupants of the house in which she, the said plaintiff, then resided, entered in and upon the house and premises known as No. 126 G St. northwest, Washington, D. C., where this plaintiff then resided and still resides, for the ostensible purpose of making certain repairs, to wit, to repair the plumbing and sewerage of said premises or of the adjoining property; that at the time aforesaid no defect within the knowledge of this plaintiff existed in regard to the sewerage or plumbing of said premises of No. 126 G street, northwest, Washington, D. C., and this plaintiff had no knowledge or expectation that any such repairs were needed or contemplated in or about or adjoining said premises; that a rear door to one of the bed-rooms on the ground floor of said premises opens upon a porch, directly in front of which door in the floor of said porch is a trap-door and stairway leading to an excavation under said premises; that said excavation has no walls or paving, and at the time aforesaid was not used,
37 and prior thereto had never been used by this plaintiff or by any of the occupants of said house and premises for storage or for any other purpose, and prior to the happening of the injuries herein complained of the said trap-door remained continually closed; that it was the duty of said defendant, his servants and employees, while in and upon said premises, to carefully conduct themselves and do no act which would endanger the life or limb of this plaintiff and other occupants of said house and premises, but that said defendant, unmindful of his duty in this regard, did at the time aforesaid and in the manner aforesaid, by his said servant and employee, enter in and upon said house and premises and entered said excavation thereunder by means of and through said trap-door, and carelessly and negligently left said trap-door open; that at the time aforesaid this plaintiff, who was engaged in household duties in said rear room, and who had no notice whatever of the presence on said premises of said defendant by his said servant and employee, or of the opening of said trap-door aforesaid, found it necessary to leave said room through the rear door thereof which opened upon the aforesaid porch, in the floor of which and directly in front of said rear-room door and within about two feet of same said trap-door

was located, and while so entering upon said porch, and without any carelessness or negligence on her part, fell through the open space which said defendant by his said servant and employee had carelessly and negligently left exposed, by reason of the opening of said trap-door; that by reason of said fall this plaintiff sustained painful, serious and permanent injuries to wit, a fracture of her right arm near the shoulder, and
38 severe and painful bruises about her left knee, right eye and head; that in consequence of said injuries she, the said plaintiff, has suffered and still suffers great pain of body and mind, and has been seriously and permanently injured in her bodily health and strength, and has sustained a severe nervous shock and has been put to great expense in procuring medicines and medical and surgical attention, and has been prevented from attending to her lawful affairs and business, and has lost great profits which she otherwise could and would have made; and the plaintiff avers that the injuries sustained by her were caused by the gross and wanton negligence of said defendant's servant and employee in failing to give any warning or notice of the fact that he had entered said premises and opened said trap-door and left the same open, and in carelessly allowing said trap-door to remain open; wherefore the plaintiff brings suit and claims the sum of five thousand dollars, besides costs."

To this the defendant has interposed a plea of not guilty which makes it necessary for the plaintiff, before she can claim any verdict in her favor at your hands, to prove substantially the averment of this declaration by a preponderance of the testimony. There is another question to be noted, which I will bring to your notice before I close my charge. You must be satisfied, gentlemen of the jury, of the principal facts, the material facts, that are charged in this declaration, to wit, that the defendant's servant entered these premises without the knowledge of the plaintiff, and opened a trap-door which was not customarily used for any purpose in connection with the household affairs, and that the plaintiff, having no knowledge
39 of the presence of the defendant, without any warning that he was present and had opened this door, in the course of her usual business and occupation, entered this porch where this trap-door was, and stepped into it—that it was open and she stepped into it—and that it had been opened by the servant of the defendant. You must be satisfied from the circumstances and facts which are produced in evidence here in relation to this occurrence, that the defendant, in committing these acts, of opening tho door and leaving it open, under the circumstances acted carelessly and did not observe ordinary care and prudence with reference to the safety of the plaintiff and others who might be liable to be injured by its being left in that condition.

And you must be satisfied, gentlemen, that the plaintiff herself was not guilty of negligence which directly contributed to her injury, to the injury which she received on that occasion.

It is for the plaintiff to prove that the defendant was negligent,

or rather the defendant's servant was negligent, and that in consequence he did not observe ordinary care and prudence in the matters which I have brought to your attention—it is for the plaintiff to prove that fact, the negligence of the defendant which contributed directly, or which directly caused, the injury to the plaintiff.

If the proof shall show, in your judgment, that the defendant's servant was negligent, it is however, incumbent upon the defendant to prove that the plaintiff was also negligent, and that her negligence contributed directly to the result—to her injury—of
40 which she complains. If you shall be satisfied that the defendant's servant was negligent, and that his negligence contributed to cause, in part at least, the injuries which the plaintiff received on that occasion, yet if you are also convinced that the plaintiff was also negligent in regard to her own safety and did not observe ordinary care and prudence in her conduct, by reason of which she was injured it will be your duty to return a verdict for the defendant; because if both parties are negligent, both the plaintiff and the defendant are negligent, the law will not undertake to apportion damages, nor to allow a jury to attempt to apportion damages, imposing a part upon the defendants, and a part upon the plaintiff, who has been injured, and in such case the verdict must be for the defendant.

You must, then, be satisfied, gentlemen, before you can return a verdict for the plaintiff, that the defendant was guilty of negligence, of not exercising ordinary care and prudence in the premises, and you must also be satisfied that it was not the plaintiff's fault, that is that her want of care and diligence upon her own part with reference to her own safety was not such as ordinary persons, persons of ordinary care and prudence, would have observed, and that therefore she was not guilty of contributing to her own injury; for, as I have said, if you are satisfied of that fact, you must return a verdict for the defendant.

But if you shall find that the defendant has been guilty of negligence, through his employee or servant, in not exercising ordinary care and prudence, and that the plaintiff has not been guilty
41 of any want of prudence—if under the circumstances any person of ordinary care and prudence would not have done differently from what she did do—it would be your duty to return a verdict for the plaintiff for whatever damages, in your judgment, plaintiff has suffered.

Some special instructions will be given you upon that subject further along. Some prayers have been offered on behalf on the plaintiff, which the court has sanctioned, and will give to you in charge. Prayer No. 2 of the plaintiff is as follows, and is given to you as the law:

"2. If the jury believe from a preponderance of all the evidence in the case that the trap-door in question was opened and left open by the defendant's servant and employee and still remained open at the time of the injury sustained by plaintiff in this case, and if

they further believe from the evidence that plaintiff at the time mentioned had no knowledge of the fact that said trap-door was open and had received no previous warning and had no reasonable expectation or apprehension that said trap-door was open at the time of the injury and that the plaintiff while in the exercise of reasonable care and diligence fell through said trap-door opening, and that the defendant's employee was guilty of negligence which caused the injury to the plaintiff, then their verdict should be for the plaintiff."

Prayer No. 3 of the plaintiff, as the court has been asked to give it in charge, is given to you as the law, as follows:

42 "3. If the jury believe from a preponderance of all the evidence that the defendant by his servant and emplo-ee entered in and upon the premises occupied by this plaintiff at the time of the injury complained of, and without notice or warning of his presence on said premises and of his intention to enter said excavation, and opened the trap-door of said excavation and entered said excavation carelessly and negligently leaving said trap-door open and that as a result thereof the plaintiff while in the exercise of reasonable care and diligence fell through said opening and was injured then their verdict should be for the plaintiff."

Prayer No. 4, of the plaintiff's prayers, is as follows, and as modified by the court is given to the jury as the law.

"4. The jury are instructed that the burden of proving that plaintiff was guilty of contributory negligence is upon the defendant and in the absence of proof to the contrary the law presumes that plaintiff was exercising reasonable and proper care and caution at the time she was injured.

"Contributory negligence in order to avail as a defence must be established by a preponderance of the testimony, but in determining whether the plaintiff was guilty of negligence which contributed directly to her injury, the jury will consider the evidence of the plaintiff as well as the defendant."

I will give you next prayer No. 1, of the plaintiff as modified by the court. It is as follows:

43 "The jury are instructed that in determining the preponderance and weight of the evidence the jury are not necessarily to be governed by the number of witnesses who testified as to any disputed fact, but that it is proper and competent for them to consider the witnesses' source of knowledge, and their opportunity for gaining information as to the facts testified to and also to determine from the general bearing and manner of a witness and the character of the testimony given, the weight and credibility to be given to the testimony of such witness."

Prayer No. 4 of the defendant's prayers is given to the jury as modified by the court, and is as follows:

"4. The jury are instructed that if they find from a preponderance of all the evidence in the cause that the plaintiff failed to exercise reasonable care in approaching the opening in the porch of the premises in which she resided, and that such failure on her part

contributed directly to the occurrence of the accident, and her injury, then their verdict should be for the defendant."

And on behalf of the defense, the prayer No. 5 of the defendant is given to the jury as the law, as follows:

"5. The jury are instructed that in this action the burden is upon the plaintiff to establish by a fair preponderance of all the testimony, all the facts which under the instructions of the court, it is necessary for her to establish in order to entitle her to recover, and if the jury shall find that the plaintiff has failed in any material matter to so establish the fact or facts, then their verdict should be for the defendant."

You will understand, gentlemen, that the facts referred to here in this instruction relate to the facts which the court has ad-
44 vised you it is necessary for the plaintiff to establish before she can recover a verdict at your hands, and the import of this instruction is that if the plaintiff has failed to establish any one of these material facts by a preponderance of the evidence, the defendant is entitled to a verdict.

Prayer No. 5 of the plaintiff is as follows, and is given to you as the law:

"5. If the jury find for the plaintiff they are to consider in estimating the damages the injuries to the plaintiff and the damages resulting therefrom to her, they are to take into consideration the sufferings including bodily pain in consequence of such injuries and also the mental suffering and pain attendant upon and the natural incident of such bodily suffering, the character and extent of her physical disabilities, and whether the injury is permanent or otherwise, and they should award such damages within the limits of the sum claimed in the declaration as will fairly and reasonably compensate the plaintiff for the personal injuries suffered by her."

Thereupon the court in explanation of plaintiff's fifth prayer further instructed the jury as follows:

If the jury find for the plaintiff, that is upon the several matters which I have called to your attention, and which I have told you the plaintiff must prove by a preponderance of the evidence—if you find for the plaintiff upon these contested matters—then it will be your duty to consider what the amount of your verdict shall be, and you may consider her bodily suffering and pain, and also her mental pain resulting from her physical injuries, and determine from those matters—from the consideration of those matters
45 as they are presented by the testimony—the amount which in your judgment she ought to recover as damages.

I believe, gentlemen of the jury, that there has been no evidence offered of any injury occasioned to plaintiff by the expenditure of money for sustenance or physician's bills or medicine or anything of that kind, and of course you can render no verdict for those causes.

There is also another matter to which it is proper I should call your attention. Something has been said here in the course of the testimony by counsel, perhaps, and possibly some expression from the

witnesses, that plaintiff was accustomed to do her son's housework, to be his housekeeper, and that since the time of her injury she has not been able to perform that duty, and that she has been unable to labor otherwise as she was accustomed to do before her injury. It is perhaps proper enough that that should be mentioned for the purpose of showing what her condition has been, the extent of her injury, how it has affected her bodily or mentally since the time of the injury, but it is not proper to be an item of pecuniary indemnity to the plaintiff on account of this injury, that her son has lost her services, the services which he was accustomed to have; damages for any injury that may have resulted to her son or to anybody else besides herself, by reason of her having received these injuries cannot be awarded. It is only such damages as are set forth in the prayer of the plaintiff which I have read to you and given to you as the law governing the case, so far as damages are concerned. That is, as I will remind you, that they must be confined exclusively—if your verdict is for the plaintiff, when you reach the question of damages if you reach that at all—if you shall
46 find for the plaintiff you are to take into consideration the sufferings, including bodily pain in consequence of such injuries, and also the mental suffering and pain attendant upon and the natural incidents of, such bodily suffering, the character and extent of her physical disabilities, and whether the injury is permanent or otherwise; and you should award such damages, within the limits of the sum claimed in the declaration, as will fairly and reasonably compensate the plaintiff for the personal injuries suffered by her; that is, the bodily and mental sufferings of the plaintiff occasioned by this injury.

Mr. RIDOUT: Now I ask your honor to say to the jury in your own language that if they find from a preponderance of the evidence that Mr. Wills the son knew of the presence of the workman upon the premises, and of his entering in and upon the trap-door, they are to consider that knowledge of the son in reaching their conclusion upon the question of the negligence of the defendant's servant in opening the trap-door, and that that is to be considered whether they find that Mrs. Wills knew of it or not.

The COURT: Yes, provided—they must find, however, in order to affect the plaintiff with the knowledge of the son, that the son had notice of the fact that the party had entered and left the trap-door open and unguarded.

Thereupon counsel for the defendant objected to the following portion of the charge by the court, to wit:

"You must then be satisfied gentlemen, before you can return your verdict for the plaintiff, that the defendant was guilty of negligence, of not exercising ordinary care and prudence in the premises."

47 But the court overruled the objection, to which ruling counsel for the defendant excepted.

All the exceptions hereinbefore set forth, were each severally taken and were each severally and separately noted by the justice presiding upon his minutes before the jury retired.

Thereupon the jury retired to consider of its verdict and afterwards came into court and returned a verdict for the plaintiff for sixteen hundred dollars.

And the defendant prays the court to sign and seal this his bill of exceptions in order that the same may be made part of the record, which is accordingly done now for then, this 23rd day of December, A. D. 1902.

E. F. BINGHAM,
Chief Justice.

[SEAL.]

Memorandum.

January 2, 1903.—Time to file transcript of record in Court of Appeals extended to January 31, 1903.

48 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 47, inclusive, to be a true and correct transcript of the record, as per rule 5 of the Court of Appeals of the District of Columbia, in cause No. 44,535, at law, wherein Barbara Wills is plaintiff, and Julius I. Atchison is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 16th day of January, A. D. 1903.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1277. Julius I. Atchison, appellant, *vs.* Barbara Wills. Court of Appeals, District of Columbia. Filed Jan. 28, 1903. Robert Willett, clerk.